

**COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION**

In the Matter of:

**ELECTRONIC APPLICATION OF)
KENTUCKY POWER COMPANY FOR)
APPROVAL OF AFFILIATE AGREEMENTS) Case No. 2021-00421
RELATED TO THE MITCHELL)
GENERATING STATION)**

**ATTORNEY GENERAL AND KENTUCKY INDUSTRIAL UTILITY
CUSTOMER'S JOINT POST-HEARING MEMORANDUM BRIEF**

Pursuant to the Kentucky Public Service Commission's ("Commission") March 31, 2022 Order, the Intervenors, the Attorney General of the Commonwealth of Kentucky, by his Office of Rate Intervention ("Attorney General" or "AG"), and Kentucky Industrial Utility Customers ("KIUC"), submit this Joint Post-Hearing Memorandum Brief.

Kentucky Power Company ("Kentucky Power") and Wheeling Power Company ("Wheeling") are wholly-owned subsidiaries of American Electric Power Company, Inc. ("AEP").¹ Kentucky Power and Wheeling each own a 50% undivided interest in the Mitchell Electric Generating Unit ("Mitchell"), a 1,570 MW coal-fired, steam-generating plant in Moundsville, West Virginia.

On July 15, 2021, the Commission authorized Kentucky Power to perform the necessary work at Mitchell to comply with the Coal Combustion Residual ("CCR") Rule.²

¹ *Electronic Investigation of the Service, Rates, and Facilities of Kentucky Power Company*, Case No. 2021-00370, Order (October 8, 2021) at 1-2.

² *Electronic Application of Kentucky Power Company for Approval of a Certificate of Public Convenience and Necessity for Environmental Project Construction at the Mitchell Generating Station*, an Amended

In that same order, the Commission denied Kentucky Power the authority to make investments needed to comply with the Effluent Limitations Guidelines Rule (“ELG”).³ Inability to meet the ELG Rule’s requirements effectively requires discontinued operation of Mitchell by Kentucky Power at the end of 2028. Conversely, the West Virginia Commission approved Wheeling to make investments needed to meet the requirements of the CCR Rule and the ELG Rule.⁴ Thus, a circumstance was created in which Wheeling has the authority to proceed with ELG investments that allow it to operate the co-owned Mitchell beyond 2028, while Kentucky Power does not. To that end, on October 8, 2021, the Commission found that, “[t]he Commission expects Kentucky Power and Wheeling to promptly seek modifications to the Mitchell operating agreement should Wheeling move forward with the ELG project, in particular the provisions designating Kentucky Power the operator of Mitchell and assigning it certain responsibilities in that role.”⁵

On October 26, 2021, AEP announced that it had agreed to sell Kentucky Power to Liberty Utilities Co. (“Liberty”).⁶ Liberty and AEP have jointly requested approval for the transfer of control of Kentucky Power to Liberty, but that request has yet to receive approval.⁷ Should that request be approved, Liberty would step into the shoes of Kentucky Power and would inherit its rights, duties, responsibilities, and liabilities related to Mitchell.

Environmental Action Plan, and Revised Environmental Surcharge Tariff Sheets, Case No. 2021-00004, Order of July 15, 2021.

³ *Id.*

⁴ *Application for the Issuance of a Certificate of Public Convenience and Necessity for Internal Modifications at Coal Fired Generating Plants Necessary to Comply with Federal Environmental Regulations*, Case No. 20-1040-E-N, West Virginia Public Service Commission.

⁵ *Electronic Investigation of the Service, Rates, and Facilities of Kentucky Power Company*, Case No. 2021-00370, Order (October 8, 2021) at 9.

⁶ *Electronic Joint Application of American Electric Power Company, Inc. Kentucky Power Company, and Liberty Utilities Co. for Approval of the Transfer of Ownership and Control of Kentucky Power*, Case No. 2021-00481.

⁷ *Id.*

On November 5, 2021, AEP, through Kentucky Power, initiated this docket. Here, Kentucky Power proposed to modify the Operating Agreement which controls the operation of Mitchell by Kentucky Power and Wheeling. Additionally, Kentucky Power proposed to newly create an Ownership Agreement which would govern the potential dissociation of the interests in Mitchell between Kentucky Power and Wheeling in Mitchell at a future point.

AG-KIUC recommend that the Commission: 1) reject the proposed changes to the Operating Agreement, but reauthorize the current version of the Operating Agreement with limited, necessary modifications; 2) deny creation of an Ownership Agreement because it is unnecessary and it is inappropriate at this time; 3) find that the currently proposed, revised version of the Ownership Agreement is flawed; and 4) find that the previously proposed version of the Ownership Agreement is also flawed. Further, AG-KIUC submit that the process provided to review the currently proposed, revised version of the Ownership Agreement is insufficient and inconsistent with due process.

I. The Commission Should Reauthorize The Current Operating Agreement, With Limited Modifications.

Reauthorizing the current Operating Agreement with limited modifications is sufficient to allow for the continued operation of Mitchell.

As stated above, on October 8, 2021, the Commission found that “[t]he Commission expects Kentucky Power and Wheeling to promptly seek modifications to the Mitchell operating agreement should Wheeling move forward with the ELG project,

in particular the provisions designating Kentucky Power the operator of Mitchell and assigning it certain responsibilities in that role.”⁸

Regarding potential changes related to making Wheeling the operator of Mitchell, AG-KIUC agree that limited modifications to the Operating Agreement should be made to allow for Wheeling to become the operator. As envisioned by the Commission’s Order, such changes are reasonable in light of Wheeling’s anticipated investment in ELG to facilitate its longer-term use of Mitchell.

Additionally, as identified by Vice Chair Cubbage, if the transaction with Liberty were approved, the Operating Agreement would need to be amended to the extent that AEP exercises any authority under the Operating Agreement independent of the authority it exercises through its ownership of Wheeling Power.⁹ Specifically, AEP should no longer have direct membership on the Operating Committee as outlined in Section 7.1 of the current Operating Agreement. Also, amendment to Article 8.2 of the current Operating Agreement will be necessary to allow for the continuance of the Operating Agreement if the transaction with Liberty is approved, because Kentucky Power will no longer be an affiliate of AEP.

The Commission should approve these limited, reasonable amendments of the Operating Agreement to allow Wheeling Power to become the operator of Mitchell, to address AEP’s involvement on the Operating Committee, and to allow the Operating Agreement to continue in effect after disaffiliation of Kentucky Power and Wheeling. Such small, reasonable, and necessary steps were surely what the Commission clearly

⁸ *Electronic Investigation of the Service, Rates, and Facilities of Kentucky Power Company*, Case No. 2021-00370, Order (October 8, 2021) at 9.

⁹ Hearing Tr. (March 30, 2022) at 15:01:15.

envisioned when it entered its Order of October 8, 2021. With these limited changes, there is simply no need to approve the creation of an Ownership Agreement at this time.

II. Creation of an Ownership Agreement Is Unnecessary And Inappropriate At This Time.

As articulated by Mr. Kollen during his direct hearing testimony, creation of an Ownership Agreement is unnecessary to allow for the continued operation of Mitchell in the near term.¹⁰ The current needs of the parties can be addressed sufficiently under the existing Operating Agreement with the limited modifications described above.

The major disagreement regarding the creation of an Ownership Agreement relates to the early and unnecessary structuring of the transaction(s) controlling the potential dissociation of Kentucky Power and Wheeling with respect to Mitchell, which AEP proposed in the multiple versions of the Ownership Agreement. There is simply no current need to structure a downstream transaction which may or may not take place years from now and which might be impacted by intervening events. Through this proceeding, AEP repeatedly failed to articulate a reasonable basis supporting a conclusion that the creation of an Ownership Agreement is necessary. As such, an Ownership Agreement should not be approved at this time.

Even if AEP had articulated a reasonable basis for considering an Ownership Agreement, given the potential transfer of Kentucky Power to Liberty, now is not the appropriate time to structure that potential transaction. Kentucky Power should not be allowed to set the rules of the game while it, perhaps temporarily, controls both sides of the game board. Kentucky law treats transactions between affiliates differently than those

¹⁰ *Id.* at 14:47:00.

between non-affiliates. For instance, transactions between affiliates are governed by KRS 278.2207(1), which states:

The terms for transactions between a utility and its affiliates shall be in accordance with the following: (a) Services and products provided to an affiliate by the utility pursuant to a tariff shall be at the tariffed rate, with nontariffed items priced at the utility's fully distributed cost but in no event less than market, or in compliance with the utility's existing USDA, SEC, or FERC approved cost allocation methodology. (b) Services and products provided to the utility by an affiliate shall be priced at the affiliate's fully distributed cost but in no event greater than market or in compliance with the utility's existing USDA, SEC, or FERC approved cost allocation methodology.

In other words, transactions between affiliates are required to be transacted at net book value. Such a requirement does not apply between non-affiliates. Requirements such as this are necessary in highly regulated and captive markets because it is common sense that affiliated businesses under common control do not act on the same set of incentives as dissociated businesses guided by independent incentives, interests, and duties. Affiliates are subject to unfair manipulation at the hand of their common master which could have negative down-stream impacts on the consumer of the goods or services offered by those businesses.

Kentucky Power and Wheeling are currently affiliates, inasmuch as both are wholly-owned by AEP, but if the Liberty transaction is approved, this will no longer be the case for Kentucky Power. Thus, AEP currently has control of an entity that it has already agreed to sell, and is attempting to set the rules for a transaction between that entity and one that it will continue to own, Wheeling. AEP has an obvious incentive to structure the Ownership Agreement's rules to the benefit of Wheeling and to the detriment of Kentucky Power and its ratepayers. At this time, the regulator is the only guardian of the public that has the authority to impact the proposal. There is a better

chance that the interest of ratepayers will be considered if an Ownership Agreement is proposed later, when Kentucky Power is not controlled by AEP. Now is not the appropriate time to set the rules for transactions between Kentucky Power and Wheeling.

AEP may argue that Liberty, Kentucky Power's potential buyer, has approved of the Ownership Agreement. However, Liberty is not a party to this case and has not formally offered its opinion. Nevertheless, even if Liberty did approve of the proposed Ownership Agreement, that acquiescence still does not make approval of the Ownership Agreement in the ratepayers' best interests. Liberty is anxiously attempting to close on a transaction with many moving parts. Under those circumstances, Liberty might be willing to agree to something to which it would not agree during an isolated negotiation focusing directly on this important issue. Resolution of these issues should take place when a true arm's-length negotiation can take place.

III. The Current Proposed Ownership Agreement, As Revised, Is Flawed.

Even if approval of an Ownership Agreement was necessary and the timing for its consideration was right, the various versions that have been proposed suffer from numerous flaws.

Kentucky Power originally proposed an Ownership Agreement which required the sale of Kentucky Power's undivided 50% interest in Mitchell to Wheeling and set a process for valuing that interest in the event the parties could not agree on a price. That proposal and its flaws are discussed below. However, with the revised Ownership Agreement filed on March 16, 2022, Kentucky Power attempts to provide a proposal that addresses some of the flaws of the originally proposed approach. As Mr. Kollen indicated at the March

30th Hearing, the new proposal does not address those flaws to the satisfaction of AG-KIUC.¹¹ Instead, the new proposal simply trades the old flaws for new ones.

The revised Ownership Agreement replaces the requirement that Kentucky Power sell its undivided interest in Mitchell to Wheeling with a new mechanism: the unit interest swap. Under the revised Ownership Agreement, if Kentucky Power and Wheeling do not agree to a buyout of Kentucky Power's undivided 50% interest, the two units at Mitchell are required to be physically divided between Kentucky Power and Wheeling, with each utility taking 100% ownership of one of the units.

This proposal is flawed because it: (1) leaves too much power in the hands of the Operating Committee; (2) arguably encroaches on Commission jurisdiction and authority; and (3) lacks needed detail on numerous important topics.

First, the proposal leaves too much power in the hands of the Operating Committee. Mr. Haynes testified that part of the impetus for the revised Ownership Agreement was that AEP heard the concerns expressed regarding the originally proposed version of the Ownership Agreement and the revised version is an attempt to address those concerns.¹² However, the means by which those concerns were addressed is to refer resolution of those issues to the sole discretion of the Operating Committee. The substance of those issues is left unresolved.¹³

Second, certain provisions of the revised Ownership Agreement, including those related to arbitration, could limit the Commission's jurisdiction over future actions involving Mitchell. Under Section 12.4 of the revised Ownership Agreement, if the Operating Committee does not mutually resolve all issues related to the unit swap, the

¹¹ Hearing Tr. (March 30, 2022) at 14:47:00.

¹² Hearing Tr. (March 30, 2022) at 11:24:12.

¹³ Hearing Tr. (March 30, 2022) at 14:48:20.

matter is referred for arbitration that is, “*final and binding upon the Owners and not subject to appeal or review...*”¹⁴ Section 13.2 goes on to provide that the Ownership Agreement, “*is subject to the regulatory authority of any State or Federal agency having jurisdiction.*”¹⁵ However, AG-KIUC are not convinced that the proposed Ownership Agreement language forecloses potential arguments that the Commission lacks the authority or jurisdiction to review a decision of the arbitrator. This is especially the case given the Commission’s discussion in its Order of February 3, 2022 in Case No. 2021-00370 relating to AEP’s practice of seeking FERC approval as a means to preempt Commission jurisdiction on certain issues. The Commission should view this issue skeptically and ratepayers would be best served if any and all agreements related to Mitchell were crystal-clear with respect to regulatory jurisdiction and authority.

Third, the revised Ownership Agreement is silent or lacks specificity on numerous topics important to ratepayers. This lack of detail could operate to the disadvantage of ratepayers when resolution of those issues are negotiated at a later date. Some of the issues lacking sufficient specificity include division of decommissioning costs;¹⁶ the structure of the potential transaction and tax consequences of that structure;¹⁷ and whether a “*make whole*” payment will be made from one party to another if one utility gets a better-performing unit.¹⁸ In sum, many concerns expressed by AG-KIUC related to the originally proposed Ownership Agreement remain unresolved under the revised version.¹⁹ The unit swap proposal has created the need for sufficient specificity with

¹⁴ Marked-Up Revised Ownership Agreement at Exhibit STH-S2 at 21-22.

¹⁵ Marked-Up Revised Ownership Agreement at Exhibit STH-S2 at 24.

¹⁶ Hearing Tr. (March 30, 2022) at 14:48:15.

¹⁷ Hearing Tr. (March 30, 2022) 14:49:00 and 14:50:20.

¹⁸ Hearing Tr. (March 30, 2022) at 14:50:55.

¹⁹ Hearing Tr. (March 30, 2022) at 14:52:00.

regard to a number of new issues. The proposed Ownership Agreement lacks that needed specificity.

Therefore, AG-KIUC request that the Commission reject the revised Ownership Agreement proposed by AEP.

IV. The Previously Proposed Ownership Agreement Was Also Flawed.

The Ownership Agreement originally tendered for approval also suffered from numerous flaws. In the event the Commission is inclined to consider an Ownership Agreement other than the revised version, AG-KIUC believe it is important that those flaws be addressed. While Mr. Haynes indicated at the March 30th Hearing that the revised version of the Ownership Agreement is now the only one before the Commission for consideration,²⁰ the Commission certainly has the authority to approve another form of the proposal on a conditional basis. Thus, discussion of the substance of the previous proposal is necessary.

A. The Previously Proposed Ownership Agreement Included Unreasonable Buyout Pricing Provisions.

Perhaps the most consequential flaw in the originally proposed Ownership Agreement related to the process for valuing Mitchell at the time of Kentucky Power's required sale of its 50% undivided interest in the plant to Wheeling. Under the terms of the originally proposed Ownership Agreement, absent an early retirement election on the part of Wheeling, Kentucky Power was *required* to sell its interest in Mitchell to Wheeling.²¹ That transaction would either be at a price agreed to by the parties or, if no agreement was reached, a default price which AEP defined as adjusted fair market value

²⁰ Hearing Tr. (March 30, 2022) at 12:36:06.

²¹ Ownership Agreement at Exhibit DMB-3 at Section 9.6.

minus decommissioning costs plus a coal inventory adjustment.²² AEP proposed that the adjusted fair market value would be determined by an elaborate appraisal process defined by the agreement.²³

The fair market value approach proposed by AEP to value Mitchell favors AEP and Wheeling to the detriment of Kentucky Power's ratepayers. Preliminarily, and as noted above, KRS 278.2207 sets the floor for transactions between affiliates at net book value, not fair market value. Kentucky Power and Wheeling are still affiliated – both are currently owned by AEP. Any suggestion that the floor should be set at another, likely lower, level of valuation takes for granted that the proposed sale of Kentucky Power to Liberty will be approved.

Nonetheless, even assuming that the transaction between AEP and Liberty had already been approved and the affiliate transaction rules no longer applied, a transaction at the alleged adjusted fair market value as defined by AEP and determined by appraisal under the originally proposed Ownership Agreement is fundamentally flawed. Such an approach produces a valuation arrived at by a fundamentally flawed process and would potentially result in unfair rates for Kentucky ratepayers. Mr. Kollen testifies:

The appraisal approach fails to recognize that the sale will not be the result of a competitive bid. The purchaser is known; it is Wheeling Power Company, which is a regulated utility subject to cost-based regulation and ratemaking recovery. The value to Wheeling Power Company of the Mitchell Plant is the net book value under cost-based regulation.

The fair market value should not be based on what an unregulated merchant generator, hedge fund, or some other private equity investor would pay. Such third parties are not eligible to purchase the Mitchell Plant interest and are not subject to cost-based regulation. Unlike unregulated investors, Wheeling Power Company is subject to cost-based regulation, and on that basis, the fair market value is net book value, not something less based on

²² Ownership Agreement at Exhibit DMB-3 at Section 9.6(a).

²³ Ownership Agreement at Exhibit DMB-3 at Section 9.6(b).

the value to a dissimilar and hypothetical purchaser. This disconnect between the actual purchaser and a hypothetical purchaser in the appraisal process inherently results in a downward bias in the appraisal results, which is compounded by the fact that appraisals necessarily rely on assumptions and forecasts of future market capacity and energy prices, which are inherently unknown and cannot be forecast with any degree of certainty or accuracy. The disconnect is further compounded by the fact that appraisals of a coal-fired plant based on what a merchant generator, hedge fund, or some other private equity investor will pay typically require discounts to compensate investors for unregulated market risk, including ESG risk, as well as further discounts to compensate the investors for the greater margins necessary to meet their required return on investment hurdle rates. These inherent and evident flaws in the required appraisal process likely would result in a negative FMV, which in turn would set the FMV component of the Buyout Price to \$0.²⁴

Further, the value of Mitchell to Wheeling is greater than the value of Mitchell to the market.

When it approved the Mitchell ELG, the West Virginia Commission cited the significant economic and community benefits of the Mitchell Plant to the state and local areas in and around Moundsville, West Virginia. In 2020, the Mitchell Plant employed 225 full-time employees with an annual payroll of \$32.5 million, or an average of \$144,477 in annual compensation per employee. The Mitchell Plant also utilized on-site contractors that account for more jobs and an even greater economic impact in West Virginia from the operation of the Mitchell Plant. In addition, nearly all of the coal burned at Mitchell (1,229,276 tons) came from mines in West Virginia (99.3% in 2020). Further, the communities in West Virginia benefit from \$2.9 million in state and local taxes, \$6.3 million in business and occupation taxes, and \$1.0 million in state employment and unemployment taxes from the Mitchell Plant, a total of \$10.2 million in such benefits each year. A third party investor would not take these local economic benefits into account. To the contrary, coal plant ownership has negative ESG scoring, which would negatively impact such third party ownership.²⁵

A valuation of Mitchell based on an alleged “*fair market value*” is flawed. Importantly, prior sales of Mitchell were at net book value, not fair market value.²⁶ The only reasoning supporting AEP’s deviation from that well-worn path at this time would

²⁴ Direct Testimony of Lane Kollen at 9-10.

²⁵ Direct Testimony of Lane Kollen at 11-12.

²⁶ Direct Testimony of Lane Kollen at 12-13.

be if AEP thought it was advantageous to its position to do so. The valuation process originally set forth may be in AEP's private interest, but it is not in Kentucky Power's ratepayer's public interest.

B. Several Other Provisions Within The Previously Proposed Ownership Agreement Were Likewise Unreasonable.

The originally proposed Ownership Agreement suffers from a number of other flaws related to 1) decommissioning costs; 2) indemnification; 3) the coal inventory adjustment; 4) tax consequences of the transaction; 5) potential attacks on Commission jurisdiction; and 6) the failure to disclose a key agreement - the Mitchell Interest Purchase Agreement.

First, the proposal is flawed with respect to decommissioning costs. The Company recovers and records amounts collected for future decommissioning costs. The Ownership Agreement does not account for those existing regulatory liabilities.²⁷ The Company ignores these prepayments through assumptions associated with the fair market valuation process. This is inappropriate. Further, the proposal effectively requires Kentucky Power to pay for decommissioning costs "*up front*" when those costs will not be incurred by Wheeling until well into the future.²⁸ This timing mismatch between payment and spend effectively results in an interest-free loan to Wheeling. Yet again, this result is in AEP's private interest, but it is not in the ratepayer's public interest.

Second, the proposal is flawed regarding its imposition of an indemnification requirement potentially valued at as much as \$15 million on Kentucky Power for the benefit of Wheeling Power related to vague "*unknown contingent events*" that could occur

²⁷ Direct Testimony of Lane Kollen at 16.

²⁸ Direct Testimony of Lane Kollen at 24-30.

through 2050. This is in AEP’s private interest, but it is not in the ratepayer’s public interest.

Third, the proposal is flawed regarding its Coal Inventory Adjustment. As Mr. Kollen notes, there are a number of other inventory items and consumables that Wheeling will benefit from that have not been included in the proposed adjustment.²⁹ This is in AEP’s private interest, but it is not in the ratepayer’s public interest.

Fourth, the proposal is flawed regarding tax consequences of the transaction. The valuation AEP proposes ignores important tax benefits that would be available to Kentucky Power if it simply retired its Mitchell interest.³⁰ Even if the Mitchell unit had a low valuation resulting from the process AEP outlined in the proposal, it would nonetheless present tax opportunities for abandonment loss. The value of such opportunities represents a more appropriate floor for the transaction than does a potential valuation of \$0 as could result from the proposed appraisal process. Failing to consider these tax issues is in AEP’s private interest, but it is not in the ratepayer’s public interest.

Fifth, the proposal is flawed regarding Commission jurisdiction. The language of the Ownership Agreement invites an argument that the Commission has no jurisdiction to review the valuation. The appraisal process is described as “*binding and conclusive on the owners.*”³¹ This is in AEP’s private interest, but it is not in the ratepayer’s public interest.

Sixth, the proposal is flawed regarding its relation to the yet undisclosed “*Mitchell Interest Purchase Agreement*” that would govern many aspects of the proposed

²⁹ Direct Testimony of Lane Kollen at 31.

³⁰ Direct Testimony of Lane Kollen at 19-24.

³¹ Direct Testimony of Lane Kollen at 8.

transaction. This agreement would have substantial impact on the transaction without having been pre-approved by the Commission. The proposal incorporated this key agreement, but it is not in the record. This lack of transparency may be in AEP's private interest, but it is not in the ratepayer's public interest.

Consideration of important provisions of the originally proposed Ownership Agreement demonstrates a theme. The original AEP proposal contains a number of provisions that favor AEP and its interest in Wheeling to the disadvantage of Kentucky Power and its ratepayers. From AEP's perspective, it is reasonable that it pursue such terms on behalf of its shareholders' interest. But it would *not* be reasonable for the Commission to approve them.

V. Due Process Concerns Support Rejection Of The Proposed Ownership Agreement.

This case commenced with the November 5, 2021 filing of a Notice of Intent by Kentucky Power. On November 19, 2021, Kentucky Power filed its application which sought to substantially revise one agreement, the Operating Agreement, and wholly create another agreement, the Ownership Agreement, which will govern the operations and ownership of an electric generating unit co-owned with affiliate, Wheeling Power. The subject matter of these agreements is important and greatly impacts ratepayers.

Between November 19, 2021 and March 1, 2022, Commission Staff and AG-KIUC both issued multiple sets of data requests to Kentucky Power seeking to learn about the proposal contained within its application. Based on that discovery, the AG-KIUC filed intervenor testimony on January 21, 2022, providing its opinion on the proposals. Subsequent to that testimony being filed, Commission Staff and Kentucky Power issued data requests to AG-KIUC, seeking to learn about the concerns and assertions articulated

within its intervenor testimony. On February 9, 2022, Kentucky Power filed rebuttal testimony, providing counterarguments to the arguments made by the intervenors. On March 1, 2022, a full evidentiary hearing was held by the Commission. This is a process that is typical for matters before the Commission.

On March 15, 2022, after an evidentiary hearing had already been held, Kentucky Power filed a Motion seeking to amend its application. The requested amendment had the effect of replacing one of the two agreements under consideration in this case, the Ownership Agreement, with an entirely new version of that Ownership Agreement which included materially different terms and wholesale changes. On March 16, 2022, AG-KIUC made a responsive filing to the Motion to Amend, asserting that, while they did not object to the amendment, the procedural schedule proposed by Kentucky Power was insufficient to allow for required discovery and development of a record sufficient for consideration of such an important request. On March 17, 2022, the Commission granted Kentucky Power's Motion to amend and entered a scheduling order substantially consistent with the one proposed by Kentucky Power. Intervenors and Commission Staff were not allowed the opportunity to conduct discovery related to the newly proposed Ownership Agreement. A final hearing was held on March 30, 2022.

AG-KIUC incorporate and adopt by reference the arguments previously made with regard to this process in the *March 16, 2022 Joint Response to Kentucky Power's Motion for Leave to Amend Application* and the *March 23, 2022 Response to Proposed Ownership Agreement*.

Any timing issues surrounding this case and the Liberty transfer case are 100% completely the making of AEP and Liberty. As Mr. Haynes testified at the March 30th Hearing, AEP and Liberty decided that the Mitchell resolution was a condition precedent

to the transfer of Kentucky Power before the transfer application was filed on January 4, 2022.³² AEP and Liberty knew of the statutory deadline under which the Commission is required to decide the transfer case. They could have waited for the Mitchell issue to be resolved or chosen not to make it a condition precedent to the sale. Instead, not only did they move forward with this case, they choose at the 11th hour to fundamentally amend that application, leaving no real time for a proper vetting process through normal Commission practices.

Time is not of the essence here. All parties are aware of the proposed transfer of control of Kentucky Power to Liberty Utilities and the statutory deadline under which the Commission must reach a decision on that issue. AG-KIUC are aware of the pressure that Kentucky Power has placed on the Commission by making resolution of this case a “*condition precedent*” to the closing on the transaction with Liberty. AEP and Liberty are seeking to leverage the statutory deadline in one case to their advantage in another. However, this case should be decided independently of that case, on its own merits, and by its own process. The issues involved are too important to ratepayers to address without a fully developed record, irrespective of who owns Kentucky Power in the coming months. For this reason alone, the Commission should reject the amended Ownership Agreement.

VI. Conclusion

For the reasons stated above, AG-KIUC recommend that the Commission reject the proposed modification of the Operating Agreement and the creation of the Ownership Agreement as proposed by AEP. Instead, the Commission should reauthorize the current

³² Hearing Tr. (March 30, 2022) at 12:06:22.

Operating Agreement with only those modifications that are necessary for the immediate continued operation of Mitchell.

Respectfully submitted,

DANIEL CAMERON
ATTORNEY GENERAL



J. MICHAEL WEST
LAWRENCE W. COOK
ANGELA M. GOAD
JOHN G. HORNE II
ASSISTANT ATTORNEYS GENERAL
1024 CAPITAL CENTER DR., STE. 200
FRANKFORT, KY 40601
(502) 696-5433
FAX: (502) 564-2698
Michael.West@ky.gov
Larry.Cook@ky.gov
Angela.Goad@ky.gov
John.Horne@ky.gov

/s/ Michael L. Kurtz
Michael L. Kurtz, Esq.
Kurt J. Boehm, Esq.
Jody Kyler Cohn, Esq.
BOEHM, KURTZ & LOWRY
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202
Ph: 513.421.2255 fax: 513.421.2764
mkurtz@bkllawfirm.com
kboehm@BKLLawfirm.com
jkylercohn@BKLLawfirm.com
Counsel for KIUC

Certificate of Service

Pursuant to the Commission's Orders in Case No. 2020-00085, and in accord with all other applicable law, Counsel certifies that an electronic copy of the forgoing was filed and served by e-mail to the parties of record.

moverstreet@stites.com
kglass@stites.com
cmbblend@aep.com
tswolffram@aep.com
jccrespo@aep.com
hgarcia1@aep.com

This 14th day of April, 2022

A handwritten signature in blue ink, appearing to read "Jennifer M. Newell".

Assistant Attorney General